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IN THE

Supreme Court of the United States

October Term, 1954

No. 10 Original

STATE OF ARIZONA, Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA, Defendants.

UNITED STATES OF AMERICA, Intervenor,

STATE OF NEVADA, Intervenor.

BRIEF OF THE STATE OF COLORADO AND THE STATE OF WYOMING OPPOSING THE MOTION OF THE STATE OF CALIFORNIA TO JOIN THE STATES OF COLORADO AND WYOMING AS PARTIES TO THIS ACTION

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BRIEF OF THE STATE OF COLORADO AND THE STATE OF WYOMING OPPOSING THE MOTION OF THE STATE OF CALIFORNIA TO JOIN THE STATES OF COLORADO AND WYOMING AS PARTIES TO THIS ACTION.

Because their interests in this matter are identical, the States of Colorado and Wyoming join in this brief. For convenience of reference, they will be referred to herein as "Respondents."

STATEMENT OF THE QUESTIONS PRESENTED

California, by her motion, seeks to make respondents parties to this action. The motion presents four questions for determination, only three of which are applicable to

respondents. The remaining question is directed to the interests of the States of Utah and New Mexico as Lower Basin States, and is applicable only to the States of Utah and New Mexico. The three questions presented and applicable to respondents are:

1. Are the rights and obligations of respondents under the Colorado River Compact in issue in this action, and if so, is there a justiciable controversy existing upon which respondents' rights and obligations thereunder can be adjudicated?
(See paragraph I, page 2, California's motion).

2. Are the respondents parties in interest in the Boulder Canyon Project Act and the California Self-Limitation Act, and if so, is there a justiciable controversy existing upon which respondents' interests therein may be adjudicated?
(See paragraph III, pages 3 and 4, California's motion).

3. Is there a justiciable controversy existing between the respondents and the United States, requiring determination in this action?
(See paragraph IV, page 4, California's motion).

STATEMENT OF THE CASE

I. PURPOSE OF PRESENT ACTION.

The present action was brought to divide, between the States in the Lower Basin, the water use to which the Lower Basin of the River is entitled under the Colorado River Compact.

THE COLORADO RIVER COMPACT DOES NOT AND WAS NOT INTENDED TO DIVIDE THE WATER USE OF EITHER THE UPPER BASIN OR THE LOWER BASIN BETWEEN THE STATES WITHIN EITHER BASIN.

The division of water use between the States of a basin is a matter outside the scope of the compact. This

principle has been recognized by all seven of the Colorado River States and the United States.

The Colorado River Compact divides water use only between two areas, designated as the Upper Basin and Lower Basin.

Respondents are located in the Upper Basin.

California and Nevada are located solely in the Lower Basin, and Arizona, although having a small area located in the Upper Basin, is located principally in the Lower Basin.

Respondents have no rights in the water use allotted to the Lower Basin by the Compact.

The States in the Upper Basin, including respondents, by agreement, have divided the water use allotted to the Upper Basin between the States in the Upper Basin.

Unlike the Upper Basin, the Lower Basin States have been unable to agree upon a division of the water use allotted to the Lower Basin by the Compact.

Consequently, this action was commenced by Arizona against California to accomplish a division of the water use in the Lower Basin by judicial decision. Nevada intervened to have adjudicated her rights to the use of water allotted to the Lower Basin by the Compact. The United States intervened to protect its rights and those of its instrumentalities and wards to the use of waters in the Lower Basin.

Arizona seeks no relief as against the Upper Basin or respondents.

Nevada seeks no relief as against the Upper Basin or respondents.

The United States seeks no relief as against the Upper Basin or respondents.

Neither Arizona, Nevada, nor the United States has asserted that the respondents are necessary or indispens-

able parties to a determination of this action.

Of the present parties to this action, California, and California alone, asserts that respondents are necessary or indispensable parties to this action.

II. PURPOSE OF CALIFORNIA'S MOTION

California, by her motion to make respondents parties, seeks to expand the action beyond its original purpose of dividing water use in the Lower Basin, to one including the adjudication of interbasin rights and obligations, including the rights and obligations of the respondents and the other Upper Basin States under the Compact; and also to adjudicate the respective rights of respondents and the United States to the use of waters of the Colorado River.

III. MOTION DOES NOT ALLEGE EXISTENCE OF JUSTICIABLE CONTROVERSY

California, by her motion, alleges three reasons why respondents are necessary or indispensable parties.

1. That there are in controversy in the present action many issues or interpretation of the Compact, and that these issues of interpretation affect the rights and obligations of respondents.
   (See paragraph I, page 2, California's motion).

2. That the meaning and effect of the Boulder Canyon Project Act and the California Self-Limitation Act are in controversy in this action, and that the issues of interpretation affect the rights and obligations of respondents.
   (See paragraph III, pages 3 and 4, California's motion).

3. That the claims of the United States in this action affect the rights and obligations of respondents.
   (See paragraph IV, page 4, California's motion).

There is no allegation in the motion that respondents, by any acts or ommissions, are depriving California or any other party to this action, of any rights claimed under the Compact or otherwise; there is no allegation that respondents are violating the Colorado River Compact, the Boulder Canyon Project Act, or the California Self-Limitation Act.

California's motion, and brief in support thereof, are premised on the assumption that at some time in the future a fact situation *may* arise, which *may* create a controversy, which *may* require the interpretation of interbasin rights and the rights and obligations of respondents.

IV. PURPOSE AND BACKGROUND OF COLORADO RIVER COMPACT

To understand the position of respondents, a brief resume of the background and purposes of the Colorado River Compact is necessary.

The Colorado River rises in the State of Colorado and flows through western Colorado and thence into Utah and enters Arizona near its northeast corner. For approximately 145 miles it forms the boundary between Arizona and Nevada, for 235 miles it forms the boundary between Arizona and California, and for 16 miles the boundary between Arizona and Mexico. Its drainage basin encompasses portions of the seven States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona and California.

The source of most of the waters of the river is in the Upper Basin of the River, located principally in Colorado, Wyoming, Utah and New Mexico.

The river, in its natural state, has great fluctations in flow, not only in the same year, varying with the seasons, but from year to year.

Before construction of Hoover Dam, which impounds water in Lake Mead, floods caused great damage, particularly in the Lower Basin of the river. Prior to the negotia-

tion of the Colorado River Compact in 1922, there was a demand in the Lower Basin of the river, and particularly in Southern California, for the construction of a large storage reservoir in the Lower Basin of the river for flood control and to accumulate waters during high flows of the river for use during low flows, to provide a firm water supply for power production, irrigation and other uses.

At the same time, Southern California desired the construction of an All-American Canal to serve the Imperial Valley, to replace the canal then serving the Valley, which was located in part in Mexico.

To accomplish these purposes, California urged Congress to construct a large storage reservoir on the river in the Lower Basin and to build the All-American Canal.

The States in the Upper Basin of the river, realizing that with the construction of these projects, development of the use of waters of the river in the Lower Basin would increase more rapidly than in the Upper Basin, insisted that the Upper States be given some protection. The Upper States feared that prior large scale development of the use of the waters in the Lower Basin, would give rise to a claim that later use in the Upper Basin could not interfere with an existing economic development in the Lower Basin, based on the prior use in that Basin.

As a result of this situation, the Colorado River Compact was negotiated (H. Doc. 717, 80th Congress, 2d Sess., p. A17, 1948). The full text of the Compact is set forth at pages 1-8 of the Appendixes filed herein by California in connection with her answer. Its fundamental underlying premise is to protect the Upper States in their future development and use of the waters of the river, while at the same time permitting the Lower States to proceed with immediate development and use. Thus, the first major purpose of the Compact, as stated in Article I of the Compact, is "to provide for the equitable division and apportionment of the use of the waters of the Colorado River system."

By the Compact, the river basin was divided into two basins, denominated the Upper Basin and the Lower Basin, with the division point at Lee Ferry, a point on the river just South of the Utah-Arizona border. The principal protection to the Upper Basin is found in Article III(a), which provides:

> "There is hereby apportioned from the Colorado River system *in perpetuity* to the Upper Basin and to the Lower Basin respectively, the exlusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist." (Emphasis ours).

We call the Court's attention to the fact that the foregoing apportionment *does not apportion or divide the water use between the individual states* of either basin, but only as between the Upper and Lower Basins of the river.

The Upper Basin contains those areas from which waters naturally drain into the Colorado River system above Lee Ferry, plus areas of the Upper Basin States located without the drainage area but which shall be served by waters diverted above Lee Ferry. The Lower Basin is the area from which waters naturally drain into the Colorado River system below Lee Ferry, plus the parts of the Lower Basin States without the drainage area which shall be served by waters diverted below Lee Ferry. (Article II(f) and (g) Compact).

Colorado and Wyoming are located solely within the Upper Basin. California and Nevada are located solely within the Lower Basin. New Mexico and Utah are located in part in the Upper Basin and in part in the Lower Basin, but their prinicipal interests are in the Upper Basin. Arizona is located in part within the Upper Basin and in part within the Lower Basin, but her principal interests are in the Lower Basin. (Articles II (f) and (g) Compact).

Recognizing these interests, the Compact divides the States into two political groups, termed States of the Upper Division, which includes Colorado, New Mexico, Utah and Wyoming, and States of the Lower Division, which includes Arizona, California and Nevada. (Article II (e) and (d) Compact).

After the Compact was negotiated and it became effective, Hoover Dam was authorized and constructed. The All-American Canal was authorized and constructed. The Lower Basin obtained the facilities of flood control, storage and the All-American Canal which it desired, and did proceed with its immediate development and use of the waters in the Lower Basin. In addition, to aid water use and development in the Lower Basin, Parker Dam, Davis Dam and other water storage and use facilities have been constructed in the Lower Basin.

As was anticipated, the development and use of the waters of the river in the Upper Basin has been far less rapid than in the Lower Basin.

The present beneficial consumptive use in the Upper Basin is but about one-third of its apportionment under Article III (a) of the Compact, being approximately 2,500,000 acre feet of the 7,500,000 acre feet apportioned (see Hearings before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, United States Senate, 83rd Congress, Second Session, on S. 1555, page 286). The unused portion of the Upper Basin apportionment is flowing into the Lower Basin and will continue so to flow until Upper Basin use increases to the amount of its apportioned share.

SUMMARY OF ARGUMENT

I. As to the questions of interpretation of the Compact raised by the motion, respondents contend:

A. The present action is one to divide water use in the Lower Basin. The Compact does not and was not intended to divide water use within a basin. The division of water use within a basin is outside the scope of the Compact. Consequently, this is not an action on or to enforce the Compact, but rather to determine an issue outside the scope of the Compact. The fact that respondents are parties to the Compact does not require their presence to determine the present issue, which is not within the scope of the Compact.

B. There is no justiciable controversy existing between respondents and California, or any other party to this action, requiring or permitting the interpretation of or adjudication of respondents' rights and obligations under the Compact. Respondents' rights and obligations under the Compact cannot be interpreted or adjudicated in the absence of an existing justiciable controversy. There is no allegation or assertion that respondents are violating the Compact or depriving California, or the Lower Basin, or any of the parties to this action, of any rights which they claim under the Compact. Respondents are not required to submit to an adjudication of their rights and obligations under the Compact in the absence of an existing justiciable controversy, and upon assumed or hypothetical facts.

II. As to the questions of interpretation of the Boulder Canyon Project Act and the California Self-Limitation Act, respondents contend:

A. The present controversy involving the Boulder Canyon Project Act and the California Self-Limitation Act relates solely to a dispute between Arizona and California, over the division of water use in the Lower Basin. Respondents have no rights in the water use to which the

Lower Basin is entitled under the Compact. Respondents have no rights or obligations involved in this controversy, and are not necessary parties to any controversy concerning these Acts.

B. The rights and obligations of respondents, if any, under the Boulder Canyon Project Act and the California Self-Limitation Act cannot be adjudicated until such time as there is a justiciable controversy existing between the respondents and some Lower Basin State, requiring such adjudication. There is no allegation in the motion that respondents are depriving California, or any other party to this action, of any rights which they claim under these Acts. There being no allegation of the existence of a justiciable controversy, respondents cannot be required to submit to an adjudication of their rights or obligations.

III. As to the claims of the United States in this action, respondents contend:

A. The United States has made no claims against and seeks no relief in this action against respondents. In the absence of such claims by the United States against respondents, there is no issue between the United States and the respondents to be determined in this action, and to which the respondents are necessary parties.

B. There is no allegation of the existence of any justiciable controversy between the respondents and the United States. Neither California nor the United States allege that the respondents are depriving the United States of any rights which it claims. The fact, if it be a fact, that at some time in the future, under some circumstances, a justiciable controversy may arise between the respondents and the United States, is not a valid ground for the requirement of the presence of respondents to the present action.

ARGUMENT

I. THE ISSUE IN CONTROVERSY IN THE PRESENT ACTION IS THE DIVISION OF WATER USE IN THE LOWER BASIN, TO WHICH RESPONDENTS ARE NOT NECESSARY OR INDISPENSABLE PARTIES.

That the issue in this action is the division of water use in the Lower Basin is clearly apparent.

Arizona, by her complaint, prays for a share of the water use "apportioned to the Lower Basin by the Colorado River Compact," subject to "the availability of such water under the Colorado River Compact." (See page 30, Arizona's complaint).

Nevada, in her petition for intervention, prays for an adjudication of her share of the water use apportioned to the Lower Basin by the Compact. (See page 25 of Nevada's petition for intervention).

California, in her answer to Arizon's complaint, asks for no affirmative relief, but alleges by way of affirmative defenses that her claims to the beneficial consumptive use of water in the Lower Basin are superior to those of Arizona, and at page 2 of her answer states:

> "This controversy centers on the desire of Arizona to secure a right to the use of water for the Central Arizona Project, which has not been authorized by the Congress. She seeks to obtain water for that project by taking it from the existing and operating California projects."

It is equally clear that the Colorado River Compact does not, and was not intended to divide the water use of either the Upper or Lower Basins.

The Colorado River Compact Commission, which negotiated the Compact, deliberately avoided any attempt to allocate waters between the States.

"During the public hearings and business meetings of the Commission, it became apparent that any attempt to allocate waters individually to the several states would be a protracting and probably unsuccessful undertaking. Participants have stated that the negotiations would have broken up but for Mr. Hoover's proposal that the Commission limit its efforts to a division of water between the Upper Basin and the Lower Basin, leaving to each basin the future internal allocation of its share."

(The Hoover Dam Documents, Second Edition, 1948, published under H. R. 391 of December 4, 1947, page 22).

"The Colorado River Compact does not attempt to divide the water of the river between individual states."

(The Hoover Dam Documents, supra, page A50).

The Upper Basin States have, by Compact, agreed upon a division between themselves of the water use allotted to the Upper Basin by the Colorado River Compact. This agreement is the Upper Colorado River Basin Compact, which was negotiated by the Upper Basin States with the consent of Congress. (See 63 Stat. 31, Appendix 30, Article VII).

Since the Lower Basin States have been unable to agree upon a division of the water uses in the Lower Basin, several attempts have been made to determine the division by litigation. (See *Arizona vs. California*, 283 U. S. 423, 51 S. Ct. 522; *Arizona vs. California*, 292 U. S. 341, 54 S. Ct. 735; *Arizona vs. California*, 298 U. S. 558, 56 S. Ct. 848; Hearings before a Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, Eightieth Congress, Second Session, on Senate Joint Resolution 145, being a resolution authorizing commencement of an action by the United States to determine interstate water rights in the Lower Colorado River Basin).

The latest of these attempts is the present action in

stituted by the State of Arizona against the State of California, and in which the State of Nevada and the United States have intervened.

The principle that the division of water use within a basin is solely an issue between the States of the basin, and not requiring the acquiescence or participation of the States of the other basin, was first recognized by the participants in the negotiation of the Compact, as we have shown above.

The same principle was later recognized by the United States Congress in the Boulder Canyon Project Act of December 21, 1928, (45 Stat. 1057), wherein, in the second paragraph of Section 4 (a) of that Act, the States of Arizona, California and Nevada were authorized to enter into an agreement for the division of the Lower Basin water use, and with no requirement that the Upper Division States acquiesce in or be parties thereto.

This same principle was also recognized by the Upper Basin States and the United States in the negotiation of the Upper Colorado River Compact, which divided the water use of the Upper Basin, and which Compact was consented to by the United States Congress. Congress and the Upper Division States did not consider that the Lower Basin States were necessary parties to that Compact, and so far as we are informed, the Lower Basin States have not contended that the Upper Basin Compact is invalid because the Lower Basin States are not parties thereto.

This same principle was recognized by the State of California in 1948. At that time, the State of California was urging the passage by Congress of the so-called McCarran Resolution, which would have required the Attorney General of the United States to institute litigation for the purpose of determining the division of the water uses in the Lower Basin. At the hearings on the McCarran Resolution in the Senate, the Assistant Attorney General of the State of California stated as follows:

"Thus, the focal point of the proposed suit is the determination of the rights of the Lower Basin States among themselves, under, and not in derogation of, the disputed documents which constitute the law of the river. There is no need to go further. NO DISPUTES OR PROBLEMS REQUIRING PRESENT DISPOSITION ARE BELIEVED TO EXIST BETWEEN THE UPPER BASIN AND THE LOWER BASIN. There is no need to determine the division of water among the Upper Basin States. They have for nearly two years been engaged in negotiation of a compact for that purpose, and it is believed that this effort will be effectual." (Emphasis ours).

"The three major issues discussed by Mr. Ely and Mr. Howard directly relate to the division of the Lower Basin water. HENCE THE UPPER BASIN STATES ARE NOT DIRECTLY CONCERNED AND NEED NOT BE MADE PARTIES." (Emphasis ours). (Hearings before the Senate Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, Eightieth Congress, Second Session, on S. J. Res. 145, at page 129).

The same statement was made at the House hearings. (See Hearings before Subcommittee No. 4 of the Committee on the Judiciary, House of Representatives, Eightieth Congress, Second Session, on H. J. Res. 225, H. J. Res. 226, H. J. Res. 227, H. J. Res. 236, and H. R. 4097, at page 214).

The three major issues referred to by the Assistant Attorney General of the State of California in these hearings are briefly:

1. By what method shall the beneficial consumptive use of water in the Lower Basin be measured?

2. Are the waters referred to in Article III(b) of the Compact apportioned water or "excess or surplus" water and unapportioned?

3. How are evaporation losses from the Lower Basin mainstream storage reservoirs to be charged in the Lower Basin?

(See pages 19 and 20 of Hearings before a Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, Eightieth Congress, Second Session, on S.J. Res. 145).

These are the same three issues presented by Arizona's complaint in the present action, which are found in paragraph XXII, at pages 25 and 26 of Arizona's complaint; which are:

1. Is the water referred to and affected by Article III(b) of the Colorado River Compact apportioned or unapportioned water?

2. How is beneficial consumptive use to be measured?

3. How are evaporation losses from Lower Basin mainstream reservoirs to be charged?

Respondents respectfully submit that the purpose of and the issue in this action is the division of water use in the Lower Basin: that this is an issue solely between the States of the Lower Basin, and does not require the presence of respondents for its determination.

II. THERE IS NO JUSTICIABLE CONTROVERSY REQUIRING OR JUSTIFYING THE INTERPRETATION OF THE COMPACT AS TO ANY RIGHTS OR OBLIGATIONS OF RESPONDENTS.

California raises many questions of interpretation of the Compact which she says should be determined in this action.

Before proceeding to discuss these questions in detail, we point out:

A. BY ARTICLE III(a) OF THE COMPACT, THE UPPER BASIN IS APPORTIONED "THE EXCLUSIVE BENEFICIAL CONSUMPTIVE USE OF 7,500,000 ACRE FEET OF WATER PER ANNUM."

THE UPPER BASIN'S PRESENT CONSUMPTIVE USE IS ABOUT 2,500,000 ACRE FEET, OR ABOUT ONE-THIRD OF THE APPORTIONMENT. THERE IS NO ASSERTION THAT THE UPPER BASIN IS EXCEEDING ITS RIGHTFUL USE UNDER THE COMPACT.

B. THE COMPACT, BY ARTICLE III(c), III(d) AND III(e), IMPOSES CERTAIN OBLIGATIONS UPON THE UPPER BASIN AND THE UPPER DIVISION STATES. BUT CALIFORNIA DOES NOT ASSERT ANY VIOLATIONS OF THESE OBLIGATIONS.

C. NOR DOES CALIFORNIA ASSERT THAT THE UPPER BASIN OR THE UPPER DIVISION STATES ARE VIOLATING THE COMPACT IN ANY RESPECTS.

D. THERE IS NO CONTROVERSY EXISTING BETWEEN THE UPPER BASIN AND LOWER BASIN.

GENERALLY, THE QUESTIONS OF INTERPRETATION RAISED BY CALIFORNIA ARE BASED ON THE PREMISE THAT AT SOME TIME IN THE FUTURE, A FACT SITUATION *MAY* ARISE WHICH *MAY* CAUSE A CONTROVERSY TO EXIST, THE DETERMINATION OF WHICH *MAY* REQUIRE AN INTERPRETATION OF THE COMPACT.

Respondents strenuously object to any attempt to determine their rights under the Colorado River Compact,

until such time as they are accused of a violation of the Compact, or until such time as they are accused of some act which deprives some Lower Basin State of some right which that State claims that it has by virtue of the Compact.

Here the Upper Division States have been accused of no violation of the Compact whatsoever.

The respondents also strenuously object to being made parties to this litigation for the purpose of interpreting the rights of the respondent States under the Compact on some theoretical or imagined fact situation, which could only occur many years in the future, and with no assurance that the suppositious controversy would ever exist.

Respondents further urge that they are entitled to have their rights under the Compact determined at the time that an actual justiciable controversy exists, and to have the interpretation of the Compact made with relation to an existing controversy and an actual fact situation. The position of the respondents in this respect is not without support by decisions of this Court. This Court has said:

> "Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of the state, for the burden on the complaining state is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. And in determining whether one state is using or threatening to use more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted."
>
> *Colorado vs. Kansas*, 320 U.S. 383, 393, 394, 64 S. Ct. 176, 181.

The Court will not grant relief against a state unless the complaining state shows an existing or presently threatened injury of serious magnitude.

Missouri vs. Illinois, 200 U.S. 496, 521, 26 S. Ct. 268, 270; *New York vs. New Jersey*, 256 U.S. 296, 309, 26 S. Ct. 268, 270; *North Dakota vs. Minnesota*, 263 U.S. 365, 374, 44 S. Ct. 138, 139; *Connecticut vs. Massachusetts*, 282 U.S. 660, 669, 51 S. Ct. 286, 289; *Alabama vs. Arizona*, 291 U.S. 286, 291, 54 S. Ct. 399, 401; *Washington vs. Oregon*, 297 U.S. 517, 522, 56 S. Ct. 540, 542.

A potential threat of injury is insufficient to justify an affirmative decree against a state. The Court will not grant relief against something feared to occur at some future time.

Alabama vs. Arizona, supra.

The judicial power does not extend to the determination of abstract questions.

New York vs. Illinois, 274 U.S. 488, 47 S. Ct. 661; *United States vs. West Virginia*, 295 U.S. 463, 474, 55 S. Ct. 789, 793.

The Court will not give advisory opinions or pronounce declaratory judgments. Its jurisdiction will not be exerted in the absence of absolute necessity.

Alabama vs. Arizona, supra; Arizona vs. California, 283 U.S. 423, 464, 51 S. Ct. 522, 529; *U. S. vs. West Virginia, supra; Massachusetts vs. Missouri*, 308 U. S. 1, 60 S. Ct. 39.

To predetermine, even in the limited field of water power, the rights of different sovereignties pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions.

U. S. vs. Appalachian Power Company, 311 U. S. 377, 423, 61 S. Ct. 291, 306.

California does not attempt to allege any facts constituting the existence of a justiciable controversy with respondents, nor would any such attempt be justified. California does not and cannot contend that the uses in the Upper Basin are in excess of its rights under the Compact. California does not and cannot contend that respondents, or the Upper Division States, are evading their obligations to the Lower Basin under the Compact.

As we shall presently show, each and every interpretation of the Compact sought by California, involving the rights and obligations of respondents, is based upon the assumption that at some time in the future, a situation or condition may arise which may require adjudication.

Under paragraph II of her brief, pages 31 to 53, California sets forth the various questions of interpretation of the Compact which she desires that respondents be required to litigate in this action. We will proceed to discuss these questions and show in each instance that there is no justiciable controversy upon which respondents can be required to litigate these questions.

DISCUSSION OF THE PARTICULAR QUESTIONS OF INTERPRETATION RAISED BY CALIFORNIA UNDER ARGUMENT II, PAGE 31 OF HER BRIEF.

California states, "THE FOUR STATES OF COLORADO, NEW MEXICO, UTAH AND WYOMING ARE NECESSARY PARTIES TO THIS ACTION BECAUSE THEY ARE PARTIES TO THE COLORADO RIVER COMPACT, THE MEANING AND EFFECT OF WHICH ARE IN CONTROVERSY IN THIS CASE, AND NO DECREE CONSTRUING THAT AGREEMENT CAN BE FULLY EFFECTIVE WHICH DOES NOT DETERMINE THEIR RIGHTS AND OBLIGATIONS AS WELL AS THOSE OF THE PRESENT PARTIES."

Under "A", page 31 of her brief, California states that respondents have certain obligations under Articles

III(c), III (d) and III(e) of the Compact, and certain rights under Articles III(a), III(e), III(f) and III(g) of the Compact, and that respondents have rights and obligations under Articles VII and VIII of the Compact.

There is, however, no allegation by California that respondents, or the Upper Division States, are exceeding their rights or evading their obligations under these various articles of the Compact, to the injury of California or the Lower Basin.

In the absence of such an allegation, there is no justiciable controversy upon which respondents' rights and obligations under these articles of the Compact can be adjudicated.

Under Argument II "B", pages 32 to 35 of brief, California discusses her controversy with Arizona over the waters of the Gila River, which is purely a lower basin dispute. As to respondents' interest therein, California states at page 34 of the brief, "The States of the Upper Division, in the calculation of their obligation under Article III(c), are thus directly affected by the question of whether or not the uses on the Gila River and other Lower Basin tributaries are accountable under Article III(a)."

Article III(c) has to do with the obligation of the Upper Division States in case there is a shortage of water to supply Mexico under the Mexican Treaty.

In other words, California says that should the time come that the Upper Division States are required to furnish water at Lee Ferry to supply a deficiency to Mexico under Article III(c), that it may then be to the advantage of the Upper Division States if California is right in her interpretation of the Gila River controversy.

California does not allege that there now exists a shortage in the supply to Mexico under the treaty and that the Upper Division States are refusing to recognize their obligation under Article III(c).

What California says in effect is that at some time in the future there *may* be a shortage of water to Mexico, and that at that time the Upper Division States *may* refuse to recognize their obligation under Article III(c), because they *may* not agree with California on the Gila River dispute.

The facts are that the Upper Division States are now consumptively using but approximately 2,500,000 acre feet of their apportioned 7,500,000 acre feet; and that under the present uses there is more than sufficient water to satisfy the Mexican needs from the unused portion of the Upper Basin's share alone.

Under Argument "C", (page 35 of brief, California raises the question that Article VIII of the Compact, providing "present perfected rights to beneficial use of waters of the Colorado River system are unimpaired by this Compact", means unimpaired as to quality as well as quantity. At the bottom of page 35 of her brief, California says, "It is a question of fact, to be developed at the trial, what effect the increased utilization of water in the Upper Basin will have upon the concentration of salts in the residue reaching Lee Ferry."

This, we believe, is typical of California's entire position of attempting in this case to determine not only all possible questions of interpretation that may arise in the future, but also to attempt to try in advance questions of fact which may hereafter arise.

We may reasonably assume from California's statement which we have just quoted, that if the Upper Division States are made parties, California will produce testimony at the trial that increased use of water in the Upper Basin, may affect the quality of the water reaching Lee Ferry, and therefore, this Court should then determine that there can be no future development in the Upper Basin because the quality of the water *might be affected*.

There is no present allegation that the present uses

in the Upper Basin are depriving California of a quality of water to which she claims she is entitled under her interpretation of the Colorado River Compact. Nevertheless, because the Upper Basin *may*, at some time in the future, make such increases in its use in some manner which might affect the quality of the water, the Upper Division States are now to be brought into Court to try this issue upon conjecture and opinion. We submit that states should not have their rights to water, which are their very life blood, determined on any such hypothetical and conjectural assumptions. Should the time come that water uses in the Upper Basin *do* affect rights which California claims to have under the Compact, then and only then should such issues be determined.

Under Argument "D", (page 36 of brief), California discusses the manner of measurement of beneficial consumptive use. California contends that it should be measured by one method, and Arizona contends it should be measured by another.

The respondents are not concerned at this time with what particular method is used to divide the water use in the Lower Basin. As to the division of the waters within a particular basin, the particular method of measurement is a matter for those states themselves to determine.

If and when a controversy arises between the two basins as to what method of measurement shall be used to determine inter-basin rights and obligations, that question can then be determined. The question will not arise in the foreseeable future.

California states, at the top of page 38 of her brief, that if her method of measurement is used for inter-basin purposes, the Upper Basin will have between 300,000 and 500,000 acre feet less of consumptive use than if the Arizont method is used.

Yet, as we have pointed out heretofore, the Upper Basin consumptive use is only about 2,500,000 acre feet,

and its apportionment is 7,500,000 acre feet. Under either method of measurement contended for, the Upper Basin use is well within the apportionment.

When Upper Basin consumptive use approaches the Upper Basin apportionment of 7,500,000 acre feet, then and not before, there may exist a justiciable controversy upon which to litigate the question of what method of measurement of consumptive use shall be used in determining interbasin obligations. At this time, there is no such controversy. Admittedly the Upper Basin is well within its apportioned use, whichever method of measurement is used.

Argument "E" (page 39, California's brief). Under this argument, California discusses the matter of how salvage water is to be charged. What we have said with regard to Argument "D" likewise applies to this argument. At some time in the future, an interbasin controversy may arise over the question of how salvage waters are to be charged. At the present time, this is an intrabasin controversy between Arizona and California. It only becomes important to the Upper Basin when the Upper Basin uses or the Lower Basin demands raise the question.

There is not now any controversy between the two basins over this question, for irrespective of how salvaged waters are to be charged, the Upper Basin use is well within its apportionment under the Compact.

Argument "F" (page 41 Brief). California contends that the Upper Basin uses are limited to a maximum of 7,500,000 acre feet in a given year under Article III(a) of the Compact.

California does not allege that the Upper Basin uses have in any year exceeded 7,500,000 acre feet. California, in effect, contends that at some time in the future, the Upper Basin *may* so develop its use, that it *might* seek to beneficially consume more than 7,500,000 acre feet of water in one year, and that *if* this did happen, it would be contrary to California's interpretation of the Compact, and therefore, this Court should now determine this question.

Until the time arrives that the Upper Basin use exceeds 7,500,000 acre feet in any one year, there is no justiciable controversy upon which the Court should make an interpretation.

Argument "G" (page 43, California brief). Under Argument "G", California states that the Upper Basin States are interested in the question of how rights may be acquired in waters surplus to those specified in Article III(a) and Article III(b). California says rights may be obtained by her in such surplus by appropriation. California does not assert that the Upper Basin is depriving her of any such waters she claims by her appropriation theory. What California does say is that the Upper Basin, at some time in the future, *may* attempt to use more than its apportioned 7,500,000 acre feet, and that *if* and when that time arrives, the Upper Basin use of the excess over 7,500,000 acre feet is subject to California's prior uses. It is again necessary to point out that the Upper Basin uses are but approximately one-third of its apportionment. Yet, California would have the Upper Basin States litigate an issue now which, if it ever arises, can only arise many years in the future and after the Upper Basin has increased its use to an excess of 7,500,000 acre feet.

Argument "H" (page 45, California brief). Under this argument, California discusses the question of whether the waters mentioned in Article III(b) are apportioned or unapportioned waters.

In the first place, III(b) water is water allocated solely to the Lower Basin, and respondents have no rights therein. In the second place, in 1948, California represented to the United States Congress, in the McCarran hearings heretofore mentioned, that this issue is a controversy between Arizona, California and Nevada, and that the respondents were not necessary parties to its determination. (See Hearings before a Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, Eightieth Congress, on S. J. 145, page 429, supra).

With this we agree.

However, California, in her argument, in effect says that *if* her contention is correct, that the waters are unapportioned, and *if* III(b) waters are surplus waters, and *if* after October 1, 1963, either basin shall have reached its total beneficial consumptive use, and *if* at that time a further apportionment is thereafter made under Article III(g), and *if* the Upper Basin receives an additional apportionment, that then it may be to the advantage of the Upper Basin *if* III(b) water is construed as unapportioned water, and therefore the Upper Basin has an interest in this controversy.

Upon such a speculative and conjectural statement, California is seeking to make the Upper Division States litigate their rights.

There is no controversy existing at this time between the Upper and Lower Basins on this point. No controversy, in any event, could exist prior to October 1, 1963, which by Article III(f) is the earliest date when the matter of further apportionment can be considered.

No justiciable controversy exists between respondents and California on this question.

Argument "I" (page 46 of brief). California says that the Upper Division States are affected by the controversy between California, Arizona and Nevada over the charging of reservoir evaporation losses on Lower Basin reservoirs.

This obviously is a Lower Basin controversy. The respondents are not interested in how California, Nevada and Arizona charge the reservoir losses in the Lower Basin.

The Upper Basin States, by the Upper Colorado River Compact, charge the reservoir losses in the Upper Basin among the Upper Basin States as a consumptive use under the Colorado River Compact. (Article V, Upper Colorado River Compact).

The apportioning of the reservoir losses in the Lower Basin is purely a Lower Basin problem. The respondents are not necessary parties to a determination of this issue, and the State of California, in the McCarran hearings, represented to the United States Congress that the Upper Basin States are not directly concerned and need not be made parties to the litigation to determine this issue. With this we agree. (See Hearings before a Subcommittee of the Committee on Interior and Insular Affairs, United States Senate, Eightieth Congress, Second Session, on S. J. 145, page 429, supra).

Certainly, there is no allegation of any justiciable controversy existing between California and respondents over this question.

Argument "J" (page 48 of brief). The claims of the United States mentioned in Argument "J" of California's brief will be hereinafter discussed.

Argument "K" (pages 48 to 53 of brief). California argues that because the respondents are signatories to the compact, they must be joined in this action. That is exactly contrary to the position taken by the State of California in the McCarran hearings heretofore cited.

We repeat that California, and California alone, takes the position that the respondents and the Upper Division States are necessary parties.

This action to divide the water use in the Lower Basin is not an action to enforce the Colorado River Compact. This is an action to determine a question which was purposely eliminated from the Compact. The Compact does not and did not intend to divide the water use between the individual states within a basin. This action to divide the water use in the Lower Basin is not an action to enforce the Compact, but an action to determine rights which exist outside of the scope of the Compact.

It is also contended by California, at page 51 of her brief, that irrespective of the Compact, "All parties hav-

ing interests in Colorado River system waters must be joined." This Court has held otherwise. In the case of *Nebraska vs. Wyoming*, 295 U. S. 40, 55 S. Ct. 568, Nebraska instituted an original proceeding in this Court against Wyoming, seeking an equitable apportionment of the waters of the North Platte River. Wyoming filed a motion to dismiss, one of the grounds of which was that the State of Colorado was an indispensable party because the North Platte rises in Colorado and drains a considerable area therein. In other words, Wyoming contended that Colorado, having an interest in the North Platte River System, was an indispensable party to the controversy between Nebraska and Wyoming. This Court said, at page 43, of the U. S. Report:

> "The contention is without merit. Nebraska asserts no wrongful act of Colorado and prays no relief against her. We need not determine whether Colorado would be a proper party, or whether at a later stage of the cause pleadings or proof may disclose a necessity to bring her into the suit. It suffices to say that upon the face of the bill she is not a necessary party to the dispute between Nebraska and Wyoming concerning the respective priorities and rights of their citizens in the waters of the North Platte River."

Later Nebraska amended her complaint, alleging that Colorado,

> "By diversions of water from the river for irrigation purposes were violating the rule of priority of appropriation in force in the three states and depriving Nebraska of water to which she was equitably entitled." *Nebraska vs. Wyoming*, 325 U. S. 589, 591, 592, 65 S. Ct. 1332, 1338.

Upon these allegations the Court joined Colorado as a party. *Nebraska vs. Wyoming*, 296 U. S. 553, 56 S. Ct. 369.

Following the rule laid down in the Nebraska vs. Wyo-

ming cases, respondents state that California asserts no wrongful act of Colorado or Wyoming in the present case, nor does California allege that respondents are depriving California of any waters of the river to which she is entitled. In the absence of such allegations, respondents are not necessary parties to this action to divide water use in the Lower Basin.

Nor did this Court alter this rule in the three Arizona vs. California cases cited at page 51 of California's brief.

However, this Court, in one of these cases, *Arizona vs. California et al.*, 283 U. S. 423, 463, 464, 51 S. Ct. 522, 529, re-affirmed the rule that adjudication of rights to interstate waters must be founded on an existing justiciable controversy. This Court said:

> "There is no occasion for determining now Arizona's rights to interstate or local waters which have not yet been, and which may never be appropriated. *New Jersey vs. Sargent*, 269 U. S. 328, 338, 46 S. Ct. 122, 70 L. Ed. 289. This Court cannot issue declaratory decrees."

III. THE RESPONDENTS ARE NOT NECESSARY PARTIES TO A DETERMINATION OF THE CONTROVERSY BETWEEN ARIZONA AND CALIFORNIA UNDER THE BOULDER CANYON PROJECT ACT AND THE CALIFORNIA SELF-LIMITATION ACT.

At page 58 of her brief, California states "THE FOUR ABSENT STATES ARE NECESSARY PARTIES TO THIS ACTION IN THEIR CAPACITY AS THIRD PARTY BENEFICIARIES OF THE STATUTORY COMPACT BETWEEN THE UNITED STATES AND CALIFORNIA EVIDENCED BY THE BOULDER CANYON PROJECT ACT AND THE CALIFORNIA LIMITATION ACT."

The Boulder Canyon Project Act (45 Stat. 1057) and the California Self-Limitation Act (Chapter 16 Calif. Stats. 1929, p. 38), relate to the division of water use in the Lower Basin. These Acts are set forth at pages 9 to 31 in Appendixes to California's answer filed herein.

The Boulder Canyon Project Act, which authorized the construction of Hoover Dam, provided in Section 4(a) that no construction should be commenced until one of two conditions had been performed:

1. That all seven Colorado River Basin States ratify the Colorado River Compact; or

2. If all seven States fail to ratify the Compact in six months, then it must be ratified by six of the seven Basin States, including California, and California, by legislative act, agree "for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming" to limit her beneficial consumptive use of water from the Colorado River, for use in California, to 4,400,000 acre feet of the water apportioned to the Lower Basin by Article III(a) of the Compact, plus not more than one-half of the excess or surplus waters unapportioned by the Compact, and such uses to be subject to the Compact.

Arizona did not ratify the Compact in the six months period. The other six States, including California, did ratify the Compact, and California did pass the legislative act limiting her uses as provided for in the Boulder Canyon Project Act. This legislative act of California is commonly referred to as the California Self-Limitation Act.

California contends that Arizona is not entitled to any benefits under the California Self-Limitation Act. Her position is set forth at pages 60 and 61 of California's answer to Arizona's complaint as follows:

"Arizona, in this action, seeks to establish alleged rights dependent upon that State's participation as a party to the Colorado River Compact as a Seven-State Compact, and also seeks to establish alleged rights as a third party beneficiary of the said Statutory Compact. Arizona has not herein, or otherwise, offered to do equity and to waive any rights as such third party beneficiary, or by such waiver, or otherwise, to place California in the same position in its relation to Arizona as that which California would have occupied with respect to contractual or other rights to the use of waters of the Colorado River system, had the Legislature of the State of Arizona approved and ratified the proposed Colorado River Compact as a Seven-State Compact prior to June 25, 1929. Arizona cannot, as of February 24, 1944, and thereafter, be permitted to assert, to her advantage, and to California's detriment, rights allegedly derived from, and dependent upon, both the Colorado River Compact and the Statutory Compact." (See pages 60 and 61 of California's answer to complaint).

This is purely a dispute between Arizona and California, and the controversy relates solely to the division of the water use in the Lower Basin. This dispute has no application to inter-basin rights and obligations, nor does California allege that respondents have committed any act or omission which deprives California of any rights which she claims under these two Acts. Neither does California point out in what respect the Acts create any rights in or imposes any obligations upon respondents.

California argues that merely because respondents are named as beneficiaries in the Acts, they are necessary parties to this dispute.

This respondents deny.

Whether Arizona is or is not entitled to the benefits of this Act is a matter of no moment to respondents.

The question of whether the division of the use of the waters to which the Lower Basin is entitled under the Compact is affected by the Limitation Act, affects no rights or obligations of respondents. Respondents' rights and obligations remain the same no matter what the division of water use may be in the Lower Basin.

The mere fact that respondents are named as beneficiaries in the Acts does not create in respondents any interest in how those Acts may affect the division of water use in the lower Basin.

The mere fact that respondents are named in these Acts is not and should not be sufficient to involve respondents in this litigation, in the absence of any allegation that a justiciable controversy exists between respondents and California, involving the interpretation of respondents' rights and obligations thereunder. There is no such allegation. The respondents have been accused of no wrongful act or omission which deprives California of any right she claims.

Also, Arizona's claims under said Acts, do not affect respondents, for Arizona admits by her complaint that her claims to water use are subject to the Colorado River Compact and the availability of water under said Compact. (See prayer, p. 30 Arizona complaint).

> "Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of the state, for the burden on the complaining state is much greater than generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved."
>
> *Colorado vs. Kansas*, 320 U. S. 383, 64 S. Ct. 176, 181.

> "The governing rule is that this Court will not assert its extraordinary power to control the conduct of one state at the suit of another unless the threatened

invasion of rights is of serious magnitude and established by clear and convincing evidence."

Connecticut vs. Massachusetts, 282 U. S. 660, 669, 51 S. Ct. 286, 289.

The Supreme Court's jurisdiction "in respect of controversies between states will not be asserted in the absence of absolute necessity."

Alabama vs. Arizona, 291 U. S. 286, 291, 54 S. Ct. 399, 401.

It is respectfully submitted that respondents have no interests in issue in this dispute, and its determination does not require the presence of respondents as parties thereto.

IV. THERE IS NO JUSTICIABLE CONTROVERSY EXISTING BETWEEN RESPONDENTS AND THE UNITED STATES REQUIRING THE PRESENCE OF RESPONDENTS AS PARTIES TO THIS ACTION.

At page 61 of her brief, California states: "THE FOUR ABSENT STATES ARE NECESSARY PARTIES TO THE ADJUDICATION OF THE CLAIMS OF THE UNITED STATES TO THE WATERS OF THE COLORADO RIVER SYSTEM."

We have carefully read the petition in intervention filed herein by the United States of America. Nowhere in the petition do we find any claim of the United States against the Upper Division States or the Upper Basin or the respondents.

The United States makes certain affirmative claims to water use *in the Lower Basin*, and asks the Court to quiet the title of the United States of America in its right as asserted in the petition against the adverse claims of the State of Arizona and the California defendants. (Page 42, United States Petition of Intervention).

The United States has not requested that the Upper

Division States be made parties to this proceeding on the ground that they are necessary parties to the determination of the rights of the United States in the waters in the Lower Basin.

The United States has treated this action as one to determine the rights to the use of water in the Lower Basin of the river.

There is no allegation in the petition for intervention of the United States or California's motion, that the Upper Division States are now impairing, or are presently threatening to impair, or interfere with any rights which the United States claims in the waters of the river.

There is no justiciable controversy existing at this time between the Upper Division States and the United States of America.

So far as any claims of the United States to the waters of the river in the Upper Basin, the Upper Basin has made provision in the Upper Colorado River Compact as follows:

> "The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the State in which the use is made: provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State."
>
> (Article VII, Upper Colorado River Compact, supra).

California again enters the realm of speculation and conjecture. At page 64 of her brief, she in effect says that *at some time in the future*, the United States *may* make some claim for Indian or other uses, which *may* be so large that there *may* not be sufficient water in the river to supply those claims and the uses contemplated by the Compact, including the use apportioned to the Upper Basin.

If and when that time arrives, we assume these questions may be the subject of litigation to which all the States may be parties. At the present time no such situation exists. Consequently, there is no present justiciable controversy between the Upper Basin and the United States.

The present action is directed to a division of the water use in the Lower Basin under present conditions, and not on some condition or situation which may exist at some time in the future.

In an action brought by the United States against the State of West Virginia, to determine differences of opinion over the waters of a river, this Court said:

> "But there is presented here, as respects the State, no case of an actual or threatened interference with the authority of the United States. At most, the bill states a difference of opinion between the officials of the two governments . . . . . There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion. Only when they become the subject of controversy in the constitutional sense are they susceptible of judicial determination. See *Nashville, Chattanooga and St. Louis R. Co. vs. Wallace*, 288 U. S. 249, 259, 53 S. Ct. 345, 77 L. Ed. 730, 87 A.L.R. 1191. Until the right asserted is threatened with invasion by the act of the State, which served both to define the controversy and establish its existence in the judicial sense, there is no question presented which is justiciable by a Federal Court. See *Fairchild vs. Hughes*, 258 U. S. 126, 129, 130, 42 S. Ct. 274, 66 L. Ed. 499; *State ex rel Texas vs Interstate Commerce Commission*, 258 U. S. 158, 162, 42 S. Ct. 261, 66 L. Ed. 531; *Commonwealth of Massachusetts vs. Mellon, supra*, 262 U. S. 477, 483-485, 43 S. Ct. 597, 67 L. Ed. 1078; *State of New Jersey vs.*

Sargent, supra, 269 U. S. 328, 339, 340, 46 S. Ct. 122, 70 L. Ed. 289." *United States vs. West Virginia,* 295 U. S. 463, 473, 474, 55 S. Ct. 789, 793.

Respondents respectfully submit there is no justiciable controversy existing between the United States and respondents requiring respondents' presence as parties to this action.

V. CONCLUSION

The opposition of the respondents to being parties to this action is more than mere reluctance to engage in expensive and prolonged litigation. Water is the lifeblood of the Upper Basin. Without it, growth and development ceases. The last major source of water available for the growth and development of the Upper Basin is the water use apportioned to the Upper Basin from the Colorado River by the Colorado River Compact.

It is of paramount importance, therefore, that the states in the Upper Basin be not required to adjudicate the Upper Basin's rights under this Compact upon speculative, assumed and imagined statements of fact, which, if they ever arise, can only arise in the distant future.

These States are entitled to have their rights under the Compact interpreted in the light of an existing set of facts, creating at the time of the interpretation a justiciable controversy, so that the interpretation of the rights of these States can be made in the light of the facts then existing.

The Upper Division States are now attempting to obtain from the United States Congress an authorization for a basin-wide development to utilize a modest portion of the 7,500,000 acre feet of consumptive use apportioned to the Upper Basin. This proposed project would utilize the beneficial consumptive use of an estimated 1,700,000 acre feet per annum, which added to the present beneficial consumptive use of 2,500,000 acre feet, would make a total of but 4,200,000 acre feet of the 7,500,000 acre feet apportioned to the Upper Basin. (See Hearings Before the Subcommitteee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, House of Representatives, 83rd Congress, Second Session, on H. R. 4449, H. R. 4443, and H. R. 4463, page 697).

Moreover, the period of construction of the works to bring this development to fruition will take an estimated thirty-three years. (See Table following page 192 of the

Hearings in the House of Representatives referred to above).

In the meantime, the growth and development in the Upper Basin is outrunning the waters now available. Any delay in the development of water use in the Upper Basin is a matter of very great moment to the Upper Division States. The inclusion of the Upper Division States as parties to this litigation will be urged by opponents of development in the Upper Basin, as a reason why Congress should delay the authorization of development until the conclusion of the litigation. In fact, such argument has already been made before the Eighty-third Congress of the United States by a representative of the State of California. The Assistant Attorney General of the State of California, Mr. Ely, in testifying before the United States Senate on the proposed plan for development in the Upper Basin said:

> "The meaning of the Document (Colorado River Compact) is now in controversy in the Supreme Court in respects which affect the measure now before you."
>
> (See Hearings Before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, United State Senate, 83rd Congress, Second Session, on S. 1555, page 587).

As we have shown, there is no justiciable controversy in issue in the present action involving the rights and obligations of the respondents under the Compact.

The division of the waters to which the Lower Basin is entitled under the Colorado River Compact can be made in this litigation without the appearance of the respondents herein. California, and California alone, urges the necessity of the Upper Division States as necessary parties, and yet California, in 1948, represented to the legislative branch of the United States Government that there

was no dispute or problem requiring present disposition between the Upper Basin and the Lower Basin. California admitted at that time that the same issues which Arizona has raised by her complaint, were the only issues requiring adjudication to determine the rights of the Lower Basin States among themselves; and that the Upper Basin States were not directly concerned and need not be made parties to the litigation.

We respectfully submit that the motion of California should be denied.

Respectfully submitted,

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